

No. 87-1499

Supreme Court, U.S.

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**JOSEPH F. SPANIOL, JR.
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In The
Supreme Court of the United States
October, 1987 Term

W. STERLING ANDERSON AND
RONALD CLEMENT BISHOP,

Petitioners,

v.

UNITED STATES OF AMERICA,

ON A PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS REPLY TO THE BRIEF
FOR THE UNITED STATES OF AMERICA

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Petitioners recognize that it is crucial that issues presented to this Court are relevant to the overall administration of justice and not just to the individuals seeking review. Contrary to the government's characterization of the issues presented on appeal, (United States of America's Brief in Opposition, p. 6), the questions presented here are not fact-bound to petitioners' situation. The constitutional sufficiency of this frequently used jury instruction, the definition of requisite elements of criminal offenses, the precision required for preservation of trial objection for appeal, and the application of the proper standard of review are questions facing defendants, prosecutors, and trial judges on a daily basis.

Petitioners also recognize the value in

refraining from ruling prematurely on issues affecting the administration and fairness of criminal trials. Such restraint allows the circuits to explore and develop the law and consider the balance and interplay of competing issues. Most of the circuits have considered and ruled on the issues presented by petitioners. And, it is clear that there is disparity in the rulings. That disparity has resulted in serious discrepancies and confusion in the administration and prosecution of the law in various parts of the country. While such differences often foster thoughtful development of the law, they have served their purpose within the context of the issues presented here. There is no longer any need to develop the issue of the constitutional requirements and applications of a conscious avoidance instruction or the issue of sufficiency of objection. As the cases cited by

Petitioners and the government illustrate, the arguments and problems have been clearly identified and addressed by the circuits - with different outcomes. The time is right for intervention, for guidance and for clarification. Not only do the cases cited by Petitioners and government illustrate the disparate interpretations and applications of the conscience avoidance instruction, but this very case is an example of the confusion which the conscious avoidance instruction poses for defendants, prosecutors and trial judges. The government's instruction was drawn from three Second Circuit cases, the most recent of which was decided in 1973 (See Petition Appendix 8) and which the government cited with a "cf." notation indicating that the authority stands for a proposition which, although lending support, is different from the main proposition. A Uniform System of Citation, 9 (13th ed. 1981). At trial,

petitioner Anderson's and petitioner Bishop's counsel questioned the legal authority supporting the instruction and objected that the government's instruction undermined the element of intent. (TR 2161 and 2174-75). The government prosecutor claimed that the proposed charge was "standard law" (TR 2161) which it plainly was not - the language of the charge had been found constitutionally deficient and specific requirements had been mandated by the circuit in which it was initially offered. (See this Petition for Writ of Certiorari, p. 16-17 and 25-26). Next, the trial judge commented at the charging conference that he typically used Devitt and Blackmar instructions verbatim, (A 2172), yet he did not do so in this trial. Finally, Judge Ervin of the Fourth Circuit advised the government to discontinue use of the obsolete form. (See Appellants' Petition for Rehearing and Suggestion for

Rehearing en Banc, p. 6). There is no doubt that the sufficiency of this particular charge is neither settled nor "standard."

This case further highlights the problems which the differences in the requirements of the individual circuits create. These differences are critical because the concept of conscious avoidance is a definition of intent, and is not itself an additional, lesser mens rea as are reckless disregard and negligence. Thus, even subtle differences in language can both blur the distinctions between the levels of criminal culpability and lessen the degree of culpability the prosecution must prove. While the instruction may appear to be merely a function of statutory interpretation, it presents constitutional ramifications because of the potential for lessening the government's burden by effectively reducing the statutory mens rea requirement.

It is particularly crucial that the government be held to its full burden of proof where, as petitioners' situation illustrates, the government's case against a defendant rests solely on the prosecutor's ability to prove guilty knowledge. Guilty knowledge is the crux of this conviction. Thus, it is imperative that a jury charge which goes to the central issue of the case be pristine in its statement of the government's burden. This particular charge, which supported the theory on which the government based its closing statements, failed to sufficiently delineate the government's burden. First, the burden of proof beyond a reasonable doubt is omitted. Second, it is not merely omitted, but is supplanted by the statement ". . . it is not necessary that the government prove to a certainty" The charge does not instruct as to what degree the government must prove guilty knowledge. This leaves

the jury at best in doubt as to the degree they must be certain and at worst free to determine their own standard. Finally, the sentence, ". . . unless he actually believed that the statements in the application were true," shifts the burden to the defendant. Instead of the government showing the defendant possessed the requisite guilty knowledge, the defendant bears the burden of proving his belief.

The government cites cases which stand for the proposition that a conscious avoidance instruction is applicable to conspiracy charges. These cases are counter to the Second Circuit's position that such a charge is incongruent with the requisite elements of conspiracy. (See Petition for Writ, p. 37-39). Thus, the government's research only underscores petitioners' contention that the disagreement among the circuits with regard to the application and the required elements of a conscious

avoidance charge merit intervention from this Court. Certainly, the government offers the conscious avoidance instruction in cases of conspiracy because it believes such a charge will facilitate conviction by reducing the burden of proving actual knowledge. Further, the reduction of the government's burden in a criminal prosecution on any charge clearly impacts substantial rights. Where such a reduction infringes substantial rights or undermines the fairness of a criminal trial, the plain error doctrine is invoked.

Finally, prosecutors, defendants and trial judges alike will benefit from clarification of the degree of specificity that is required to preserve an objection for appeal pursuant to Rule 30. Judges need to know at what point to allow, to encourage, or to foreclose counsel's discussion of objections. In petitioners' trial, the judge indicated that he

understood the defendant's objection and cut-off further discussion. (TR 2174-75, 2393, 2397-99). If Rule 30 ultimately requires a higher degree of perfection, defendants will be assisted in pursuing their objections to prevent foreclosure of the appellate process. Guidance on this issue will benefit prosecutors as well because, if the requirement of Rule 30 is less stringent than the government argues here, then prosecutors will understand that they must themselves request greater clarification in order to narrow the issues for appeal. Regardless of whether Rule 30 requires greater or lesser precision in stating objections than was attained by petitioners' counsel, guidance from this Court will enhance the administration and fairness of criminal trials in this country.

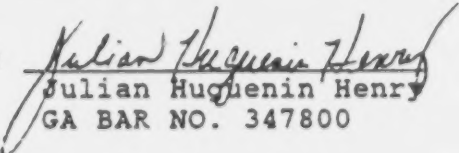
This case presents opportunity for the Court to review and clarify several issues on which the courts of appeals differ,

issues on which nearly every circuit has ruled, and on which lower courts must rule on a daily basis. While petitioners Anderson and Bishop would rejoice if review were to result in a ruling in their favor, it is clear that regardless of the ultimate outcome, clarification of the questions they present is timely, will be beneficial to the administration of trials and is essential to development of the law.

Respectfully submitted,

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